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We would like to acknowledge the contributions of Andrew Fletcher QC, Nicholas Elliott QC, Sonia Tolaney QC and David Quest QC, all of 3 Verulam Buildings, who provided invaluable guidance and oversight of specific sections of the work.
A.M. and J.O.

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1 INTRODUCTION

1.1 The UK's statutory regime for the regulation of banks and banking was first established under the Banking Act 1979. That Act constituted the Bank of England as statutory banking regulator and discharged, in part, the UK's obligation under EU legislation (in particular the First Banking Directive[1]) to establish a formal system for the authorisation and supervision of banking business carried on in or from the UK. At that time, the Bank of England was only one of a number of different regulatory agencies, each responsible for a different sector of financial services business, under different legal regimes. The Labour Government that came to power in 1997 proposed the establishment of a single regulatory regime for most financial services business. In pursuit of that policy, the regulatory functions of the Bank of England were transferred to the Financial Services Authority ('the FSA') from 1998[2]. From 1 December 2001 the FSA assumed full regulatory powers in relation to banking, insurance and investment business, under the Financial Services and Markets Act 2000 ('FSMA 2000').

Following the global financial crisis that began in 2007, the Government initiated a review of the UK's system of financial regulation. That review came to fruition as the Financial Services Act 2012 ('FSA 2012'), which substantially amended FSMA 2000. The principal change introduced by FSA 2012 was to establish the Financial Conduct Authority ('the FCA') and the Prudential Regulation Authority ('the PRA') as the statutory successors of the FSA and to give each new regulator separate but partially overlapping statutory functions and objectives under FSMA 2000 as amended[3].

1 First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.
2 Bank of England Act 1998, s 21.
3 See para **1.9** and following.

2 THE EUROPEAN CONTEXT

1.2 The substance of banking regulation in the UK has in large part been shaped by European legislation in the form of directives and regulations aimed at creating 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', as envisaged by art 3(3) of the Treaty Establishing the European Community.

Two particular articles of the Treaty on the Functioning of the European Union (formerly the Treaty of Rome) have been fundamental to the establishment of the internal market. Article 49 provides for the removal of restrictions on the freedom of establishment on nationals of one Member State in the territory of another Member State. Article 56 provides for the freedom of nationals of Member States to provide services in other Member States. With respect to banks (referred to as 'credit institutions[1]' in European legislation), these freedoms have translated into the concept of the 'passport', namely the right of a credit institution authorised in one Member State (the 'home state') to set up a branch in, or provide cross-border services into, other Member States subject only to notification of the 'host state' regulator.

A necessary corollary of the right to 'passport' has been the harmonisation of requirements relating to the taking up of the activity of credit institutions and their prudential supervision. Host states have only been permitted to impose additional requirements on passporting credit institutions in areas not harmonised at EU level and where the requirements imposed fulfil certain criteria, namely that they pursue an objective of the 'general good', are non-discriminatory, are objectively necessary, are proportionate to the objective pursued and address an objective not safeguarded by rules to which the firm is already subject in its home state. However, given that recent EU legislation in relation to credit institutions has taken the form of maximum harmonisation directives accompanied by detailed directly applicable regulations expanding across the full spectrum of bank regulation, the scope for host state measures imposed in this way is very small indeed.

Guiding the process of legislative and supervisory harmonisation amongst Member States, the European Banking Authority was established by Regulation (EC) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 and officially came into being on 1 January 2011. Its objectives are to maintain financial stability in the EU and to safeguard the integrity, efficiency and orderly functioning of the banking sector. Its competences include the prevention of regulatory arbitrage, strengthening international supervisory coordination, promoting supervisory convergence and providing advice to the EU institutions in the areas of banking, payments and e-money regulation as well as on issues related to corporate governance, auditing and financial reporting.

The principal pieces of European legislation relating to the authorisation and supervision of credit institutions are the Capital Requirements Directive[2] ('the CRD') and accompanying Capital Requirements Regulation[3] ('the CRR'). Collectively these are known as 'CRD IV', reflecting the numerous iterations that the legislation has been through, largely as a result of the 2008 financial crisis.

The CRD has been implemented into English law largely through FSMA 2000. The provisions now found in the CRR had formerly been at directive level and were thus implemented into English law through the FSA's GENPRU and BIPRU handbooks. Given that the CRR is directly applicable in all Member States – and is indeed referred to as 'the Single Rulebook' – it does not require implementation into English law. The Prudential Regulation Authority has thus disapplied most of BIPRU and GENPRU to firms within the scope of the CRR. CRD IV further provides for the preparation by the EBA of over one hundred 'Regulatory Technical Standards', which contain even greater detail than the CRR and which will themselves be directly applicable as regulations once adopted by the European Commission.

The CRD first contains the minimum requirements for access to the taking up and pursuit of the business of credit institutions. These include authorisation from a Member State regulator, a programme of operations, robust governance arrangements and minimum initial capital, along with directors and controlling shareholders considered fit and proper by the regulator. As described further here in section 8 at para **1.21**, these requirements are implemented in the United Kingdom by the Threshold Conditions stated in Schedule 6 to FSMA 2000.

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which the respondents were doing business were not, in reference to that business, their customer.'

The deposit of a sum of money by a foreign bank with an English bank, with instructions that it be transferred to another foreign bank, does not, without more, make the person at whose request the transfer is made a customer of the English bank[7].

The banker-customer relationship does not arise where an account is opened on false documents and without authority[8]. Banks seek to minimise this risk by verifying the identity of a prospective customer when the account is opened. The Money Laundering Regulations 2007 prescribe such rules (a detailed account of which can be found in Chapter 2).

1 [1901] AC 414, HL.
2 *Clarke v London and County Banking Co* [1897] 1 QB 552.
3 Per Lord Davey, *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 421.
4 [1927] 2 KB 297.
5 [1927] 2 KB 297 at 310.
6 [1927] 2 KB 297 at 305.
7 *Aschkenasy v Midland Bank Ltd* (1934) 50 TLR 209; cf also *Kahler v Midland Bank Ltd* [1948] 1 All ER 811, CA; affd [1950] AC 24, [1949] 2 All ER 621, HL.
8 See *Robinson v Midland Bank Ltd* (1925) 41 TLR 402, CA; *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep 373, CA.

2 THE CONTRACT BETWEEN BANKER AND CUSTOMER

(a) Introduction

4.7 The relationship of banker to customer is one of contract[1]. It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide. Services such as banker's drafts, letters of credit and foreign currency for travel abroad probably fall into the second category of services which the bank is not bound to supply, but this has not been judicially determined[2]. A request for an unauthorised overdraft that is accepted probably also gives rise to a special contract, although that contract is governed by the terms of the general contract[3].

1 *Foley v Hill*(1848) 2 HL Cas 28.
2 The point was expressly left open by Staughton J in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 749E, [1989] 3 All ER 252 at 269b.
3 *OFT v Abbey National plc and others* [2008] EWHC 875 (Comm) (Andrew Smith J) at paras 418-420 (considering this passage in an earlier edition of this text).

(b) The debtor-creditor relationship

4.8 The classic description of the contract constituted by the relation of banker and customer is that of Atkin LJ in *Joachimson v Swiss Bank Corpn*[1]:

> 'The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them[2]. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours[3]. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice[4]. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery[5]. I think it is necessarily a term of such a contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.'

The debtor-creditor relationship, and the need for a demand by the customer before the bank is obliged to repay the debt, is discussed further in Chapter 5 below. For present purposes, it suffices to note that the case advanced by the customer in *Joachimson* was essentially that the relation of banker and customer is that of debtor and creditor with super-added obligations, and that the customer enjoys the right of a lender to sue for his debt whenever he pleases. Atkin LJ rejected altogether this conception of a dual relation with the emphatic pronouncement that there is only one contract made between the bank and its customer[6]. This rejection did not of itself determine the point at issue — indeed, Bankes LJ reached the same decision as Atkin LJ whilst adhering to the notion of implied superadded obligations[7]. But Atkin LJ's concept of a single contract is the more convincing, and it is this concept which has prevailed.

In practice, the point appears to be of limited importance. In particular, it does not follow from the concept of an indivisible contract that the relation between a bank and a customer maintaining accounts with it in different jurisdictions is embodied in one contract governed by one proper law. It was held in *Libyan Arab Foreign Bank v Bankers Trust Co*[8] that such a contract may be governed in part by one law and in part by another. This case is considered more fully at para 4.44 below.

1 [1921] 3 KB 110 at 127.
2 See *Foley v Hill* (1848) 2 HL Cas 28; and see 'Current Accounts', Chapter 5 below.
3 See *Woodland v Fear*(1857) 7 E & B 519; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325 at 332–333, PC; *R v Lovitt* [1912] AC 212 at 219; *Garnett v McKewan* (1872) LR 8 Exch 10.
4 See *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372; and see further 'Termination' at para 4.40 below.
5 See *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777.
6 [1921] 3 KB 110 at 127.
7 [1921] 3 KB 110 at 119.
8 [1989] QB 728, 748C, [1989] 3 All ER 252, 268b.

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[5] The Trustee Act 2000 came into force on 1 February 2001 (Trustee Act 2000 (Commencement) Order 2001; SI 2001/49).
[6] Specific provisions apply to trustees of pension schemes (Trustee Act 2000 s 36), charities (Trustee Act 2000 ss 11(3)-(5) and 38). Section 11 does not apply at all to trustees of authorised unit trusts (Trustee Act 2000 s 37).
[7] In respect of bare trusts, see also s 34.
[8] Trustee Act 2000 s 26.

(c) Borrowing

6.21 Unless the will or trust deed gives authority or the sanction of s 16 of the Trustee Act 1925 can be pleaded, a trustee has no authority to borrow[1] save for certain specific purposes such as for purposes of the Settled Land Act 1925 (as applied to trustees for sale and to personal representatives), and under the Trusts of Land and Appointment of Trustees Act 1996 (addressed below).

Where borrowing is effected by virtue of the provisions of the trust deed, those provisions must be strictly construed. Section 16 of the Trustee Act 1925 provides:

> 'Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.
>
> This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust . . . .'

By s 17 of the Trustee Act 1925:

> 'No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.'

This may not, however, protect the banker where the borrowing is ultra vires. It has not been decided whether a banker may be liable, where, without the authority of the will and creditors of the testator, he allows the continuance of the account for the purpose of carrying on the business of the deceased. Without such authority, a trustee can continue the deceased's business during the process of administration only, for the purpose of selling the business as a going concern[2]. The trustee's position as regards creditors has been emphasised in *Morton v Marchanton*[3]. It not infrequently happens that where a will gives authority to carry on a business for the benefit of beneficiaries under a trust, the trustees borrow for the purpose and charge assets of the trust estate. Unless, however, the trustees have fulfilled their duties as executors and paid the debts of the testator, the latter's creditors will rank before both the indemnity of the executors (the right to be exempt from liability for their act in continuing the business) and the mortgagees of the estate. It is essential, therefore, where bankers are asked to lend against assets of the estate for such a purpose that they ensure that the debts of the testator have been paid. This applies only to the creditors of the testator, not to those of the trustees as trustees, and only where the business is being carried on for the beneficiaries,

as opposed to continuance for the purpose of effecting a sale in the winding-up. Nevertheless, executors have power to borrow and mortgage for purposes of winding up of the estate.

Where land is concerned, s 6(1) of the Trusts of Land and Appointment of Trustees Act 1996 provides that trustees of land have in relation to the land all the powers of an absolute owner. In addition, s 8(1) of the Trustee Act 2000 provides that trustee may acquire freehold or leasehold land in the United Kingdom as an investment, for occupation by a beneficiary, or for any other reason and, seemingly, the trustees may purchase the land with the assistance of a mortgage over it. Once acquired, s 8(3) of the Trustee Act 2000 provides that a trustee who acquires land under the section has all the powers of an absolute owner in relation to the land. It is unclear, however, whether such power would permit the trustees to raise money on mortgage against land so purchased for the purpose of further investment[4].

[1] *Walker v Southall* (1887) 56 LY 882; *Re Suenson-Taylor's Settlement Trusts* [1974] 1 WLR 1280.
[2] See *Dowse v Gorton* [1891] AC 190, HL.
[3] (1930) 74 Sol Jo 321, (1930) 4 LDAB 238. See also *Re Oxley; John Hornby & Sons v Oxley* [1914] 1 Ch 604.
[4] The balance of opinion in specialist texts suggests that the powers would not extend to such 'gearing up' of the trust fund: See further *Lewin on Trusts*, (18th ed), paragraphs 35-171 and 35-97; Hayton, Matthews and Mitchell: Underhill and Hayton: *Law of Trusts and Trustees*: (18th ed, 2010), paragraph 48-31.

(d) Deposit of documents for safe custody

6.22 By s 17 of the Trustee Act 2000 most trustees may appoint a person to act as a custodian in relation to such of the assets of the trust, including any documents or records concerning the assets, as they may determine[1]. The appointed custodian must fall within s 19 of the Trustee Act 2000, the relevant provision for banks being s 19(2)(a): the person to be appointed 'carries on business which consists of or includes acting as a nominee or custodian.' Pursuant to s 32 of the Trustee Act 2000, the custodian may be remunerated out of the trust funds if he is engaged on terms entitling him to be remunerated for those services, and the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of those services by him to or on behalf of that trust. The custodian may also be reimbursed for any expenses properly incurred by him in exercising functions as custodian[2].

[1] Section 17 of the Trustee Act 2000 does not apply to any trust having a custodian trustee or in relation to any assets vested in the official custodian for charities (see s 17(4)), pension schemes (see s 36), authorised unit trusts (see s 37) or certain charities (see s 38).
[2] Trustee Act 2000 s 32. For the terms upon which a custodian may be appointed, see s 20 of the Trustee Act 2000.

(e) Charity trustees

6.23 Charity trustees may, subject to the trusts of the charity, confer on any of their body (being not less than two in number) a general authority or an authority limited in such manner as the trustees think fit to execute in the

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target to hit with liability.

1 Consider, albeit decided in a different context, *Sumitomo Bank Ltd v Banque Bruxelles Lambert* SA [1997] 1 Lloyd's Rep 487, 493.
2 LMA.ICA.04, cls 21.4(b)(i)–(ii).
3 LMA.ICA.04, cl 21.4(d).
4 LMA.ICA.04, cl 21.4(e).
5 LMA.ICA.04, cl 21.4(f). See also *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), 123(f), 129(c). A similar conclusion about the courts' reluctance to imply additional duties may be derived from the reference in LMA.ICA.04, cl 21.4(a) to the fact that the security agent's duties arise 'under the Debt Documents' and accordingly not beyond the four corners of the inter-creditor and facility agreements: see *Torre Asset Funding Ltd v Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch), 142–157, 163(i).
6 LMA.ICA.04, cl 21.27.
7 Trustees Act 2000, s 1. The trustee's duty of care is 'heightened' because it has to be assessed by reference to any 'special knowledge or experience' possessed by the trustee or, where the trustee acts in the course of a business or profession, the 'special knowledge and experience' that it would be reasonable to expect of a person acting in the course of the particular type of business.
8 LMA.ICA.04, cl 21.27.
9 The negation of implied terms would also be effective to exclude the duty to exercise reasonable skill and care in the Supply of Goods and Services Act 1982, s 13: see Supply of Goods and Services Act 1982, s 16.
10 LMA.ICA.04, cl 21.4(c).
11 Consider *Torre Asset Funding Ltd v Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch), 211.
12 LMA.ICA.04, cl 21.5. As there is no fiduciary relationship between the security agent and the borrower, there is no problematic conflict of interest that arises if the security agent also provides banking, lending or other types of service to the borrower's corporate group: see LMA.ICA.04, cl 21.7.
13 LMA.ICA.04, cl 21.6.
14 For a similar conclusion in respect of the arranging and agent banks in the syndicated loan context, see *Torre Asset Funding Ltd v Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch), [28]–[30], [34], [163(ii)], [179]–[180], [192], [204]; *Barclays Bank plc v Svizera Holdings plc* [2014] EWHC 1020 (Comm), [8]–[9].
15 *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), [221]–[222].
16 *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), [31].
17 That said, in *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), [222], Eder J was prepared to assume (without deciding the point) that the security agent had breached its duties to the mezzanine lenders by 'failing to put in place 'Chinese walls' and in sharing information with one or more Senior Lenders to the exclusive of the Mezzanine Lenders'.
18 *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), 123(f). Eder J considered that this was consistent with the view of the Supreme Court in *Belmont Part Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, 421 that there is a particularly strong case when dealing with complicated financial transactional documents for giving effect to the contract the parties have agreed.
19 *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), 123(h).
20 *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm), 123(c).
21 LMA.ICA.04, cl 21.9(a).
22 LMA.ICA.04, cl 21.9(b).
23 LMA.ICA.04, cl 21.9(c).
24 LMA.ICA.04, cl 21.19.
25 LMA.ICA.04, cl 21.20(a). A security agent is also not responsible for any non-disclosure in relation to an insurance policy, unless it had been specifically requested by the 'instructing group' to disclose the matter in question: see LMA.ICA.04, cl 21.20(b).
26 LMA.ICA.04, cl 21.24.
27 LMA.ICA.04, cl 21.10. In this connection, the security agent is not responsible for carrying out any 'know your customer' checks on any of the parties or for verifying the legality of any proposed agreement or course of action: see LMA.ICA.04, cl 21.11(c). Rather, the lenders provide a contractual confirmation of the fact that they are responsible for such matters and do not rely upon the security agent in that regard: see LMA.ICA.04, cl 21.11(c). Similarly, the lenders provide the security agent with confirmation that they are 'solely responsible for

making [their] own independent appraisal and investigation of all risks' associated with the particular lending: see LMA.ICA.04, cls 21.16(a)–(e).
28 *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.
29 LMA.ICA.04, cls 21.14(a)–(b).
30 LMA.ICA.04, cl 21.14(c).
31 LMA.ICA.04, cl 21.4(a).
32 *Torre Asset Funding Ltd v Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch), [34]. In this regard, Sales J rejected (at [28]–[30], [142]–[148], [163(i)]) the 'extreme' submission that these words had the effect of making the agent bank little more than 'a postal service to transmit documents or communications from [the borrower] for the [lenders]'.
33 LMA.ICA.04, cls 21.11(a)–(b), (d).
34 LMA.ICA.04, cl 21.11(a)(i). The specific exclusion clauses are often combined with an overarching limitation clause restricting the heads of loss for which the security agent will be liable: see LMA.ICA.04, cl 21.11(d).
35 LMA.ICA.04, cl 21.11(b).
36 LMA.ICA.04, cl 21.12(a). Subject to one exception, any lender that is required to indemnify the security agent can usually seek indemnification in turn from the borrower's parent company: see LMA.ICA.04, cls 21.12(c)–(d). The security agent also has an indemnity from the borrower and other debtors on a joint and several basis: see LMA.ICA.04, cl 24.1.

11.20 A security agent's primary role is largely fulfilled once the liabilities secured upon the transaction security are satisfied by the borrower and, in those circumstances, the trust over the transaction security will be wound up and the secured assets released back to the borrower or other debtor parties.[1] Moreover, a security agent may resign its role by giving notice to the senior and mezzanine lenders that it will appoint an affiliate as its successor[2] or by giving 30 days' notice to the lenders and the borrower's parent company, in which case the 'instructing group'[3] may appoint the security agent's replacement.[4] Similarly, the instructing group can require the security agent to resign following the same notice period.[5] If there has been no new appointment within 20 days of the security agent's notice of resignation, then the retiring security agent may appoint its successor.[6] However the security agent's replacement is chosen, its resignation only takes effect once the successor is in post and once the assets subject to the lenders' security has been transferred.[7] Once the security agent's resignation takes effect it is only then discharged of any further obligations pursuant to the inter-creditor agreement.[8] The retiring security agent is required to hand over to its successor any documents or records and to provide such assistance as may reasonably be requested.[9]

1 LMA.ICA.04, cl 21.25.
2 LMA.ICA.04, cl 21.13(a).
3 LMA.ICA.04, cl 1.1.
4 LMA.ICA.04, cl 21.13(b).
5 LMA.ICA.04, cl 21.13(g).
6 LMA.ICA.04, cl 21.13(c).
7 LMA.ICA.04, cl 21.13(e).
8 LMA.ICA.04, cl 21.13(f).
9 LMA.ICA.04, cl 21.13(d).

4 MINORITY AND JUNIOR CREDITOR PROTECTION

11.21 In circumstances where a formal lending tier arises, there is always the risk that the borrower's assets will be insufficient to satisfy the claims of the junior creditors. Similarly, in cases where a lender's interest is functionally subordinated because it represents the minority voice in a syndicated loan

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memorandum irrespective of how the particular claim has been framed.[1] Negligence-based arguments by the syndicate banks have generally taken three forms. First, the syndicate lenders may allege that the arranger assumed responsibility for a particular task or for achieving a particular result. An example of such a case is *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA*,[4] where (exceptionally) Langley J held that the arranger had assumed responsibility to the syndicate banks for ensuring that valid 'mortgage indemnity guarantees' were in place to protect the banks against the borrower's default and that all necessary disclosures had been made in respect of those guarantees. Significantly, the documentation and the loan agreement in *Sumitomo* contained nothing that was inconsistent with or precluded the imposition of a common law duty of care on the arranger, in particular the fact that the arranging bank owed only limited contractual duties as *agent* bank under the terms of the loan agreement did not preclude a wider tortious duty applying to its acts as *arranging* bank.[5]

Secondly, the lenders' claim may be based upon a duty to disclose certain information. This occurred in *IFE Fund SA v Goldman Sachs International*,[6] where the Court of Appeal rejected an argument that the arranger owed the bondholders a duty to disclose subsequently acquired information that might affect the accuracy of the information memorandum or associated documentation. Waller LJ concluded that the arranger could not be taken to have assumed responsibility to the claimants for updating the information memorandum when the documentation provided to the bondholders expressly stated that the arranger provided no undertaking in that regard.[7]

Thirdly, the syndicate members may allege that the arranger had a duty to advise them generally or in relation to a particular aspect of the loan agreement. As considered above in the context of whether the arranger has a duty to advise the borrower,[8] the courts have been particularly reluctant to impose advisory duties on parties in the absence of an express undertaking to advise, especially when the dispute is between sophisticated commercial parties, the relevant services are provided on an 'execution only' basis and the terms of the arrangement negate the existence of any such duty.[9] All or most of these factors are usually present in the dealings between an arranger and the syndicate banks.

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1 Indeed, in *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487, 512, Langley J expressed some concern about allowing claimants to avoid bearing the burden of proving negligence by framing their claim as one based upon a misrepresentation (within the Misrepresentation Act 1967, s 2(1)) in circumstances where the 'substantial representation' is essentially that the defendant would take proper care over a particular task. For similar concerns about parties seeking to sidestep the requirements and limitations of the tort of negligence by pleading a misrepresentation within the Misrepresentation Act 1967, s 2(1), see *Avon Insurance plc v Swire Fraser Ltd* [2000] CLC 665, [200]–[201]; *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [85].

2 If the arranger is not responsible for putting the 'information memorandum' together, but rather acts as a 'mere conduit' for passing the information provided by the borrower to the syndicate lenders, then there is likely to be a reluctance to impose liability for negligent misstatement upon the arranger: see *Re Colocotronis Tanker Securities Litigation* 420 F Supp 998 (1976); *Royal Bank Trust Co (Trinidad) Ltd v Pampellone* [1987] 1 Lloyds Rep 218, [19]–[23].

3 *Hedley Byrne* & Co *Ltd v Heller & Partners Ltd* [1964] AC 465, 486–487, 502–503, 511, 529–530, 539; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 180; *White v Jones* [1995] 2 AC 207, 262; *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, 583; *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, [4], [52], [83]. Although it is also possible to impose a duty of care for negligently caused 'pure' economic loss by applying the 'three-step' test in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617–618, 629, 633, 639–640, 659, this can only generally be used in 'novel factual scenarios' and has been doubted as a useful test: see *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, [71]–[72], [93]; cf *Van Colle v Chief Constable of Hertfordshire Police* [2008] 3 All ER 977, [42]. In *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487, 512, Langley J did not consider that it mattered which approach was taken in that particular case.

4 *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487, 512–514. See also S Sequiera, 'Syndicated Loans — Let the Arranger Beware!' (1997) 12 JIBFL 117.

5 *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487, 493.

6 *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep 449, [28], [79]. See also *NatWest Australia Bank Ltd v Tricontinental Corp Ltd* [1993] ATPR (Digest) 46–109, where the Supreme Court of Victoria held the defendant arranging bank liable in the tort of negligence (and under the Trade Practices Act 1974 (Cth)) to the claimant syndicate member for failing to disclose in the information memorandum that the borrower had given related-party guarantees and a guarantee in favour of the arranging bank itself, despite the claimant having specifically enquired about the borrower's contingent liabilities before agreeing to lend. The imposition of liability in this case, however, 'depended heavily on the facts' and was 'fact-specific': see L Gullifer & J Payne, *Corporate Finance Law: Principles and Policies* (Hart Publishing, 2011) [7.4.4].

7 *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep 449, [28]. See also LMA.LeveragedFinanceFacilityAgmt.09, cl 32.8: ' . . . the Arranger . . . is [not] responsible or liable for the adequacy, accuracy or completeness of any information (whether oral or written)' supplied by it in connection with the loan agreement or the information memorandum.

8 See para 12.13 above.

9 See LMA.LeveragedFinanceFacilityAgmt.09, cl 32.4: 'Except as specifically provided in the Finance Documents, the Arranger has no obligations of any kind to any other Party under or in connection with any Finance Document.'

(iii) *Arranger's Breach of Fiduciary Duty*

12.21 Given the difficulties of demonstrating that the arranger has assumed responsibility sufficient to give rise to a common law duty to disclose information or provide advice, some syndicate banks have tried to argue that the arranger has become their fiduciary and in that capacity has failed to disclose information that would have materially affected their decision to join the syndicate. In principle, such an argument should be no more successful than seeking to impose a common law duty of disclosure on the arranger, since many of the reasons, discussed above,[1] for refusing to impose fiduciary duties on arranging banks towards corporate borrowers apply *mutatis mutandis* to the arranging bank's position *vis-à-vis* the members of the lending syndicate. Nevertheless, the opposite was suggested in *UBAF Ltd v European American Banking Corp*,[2] where the arranging bank applied to set aside the service out of the jurisdiction of a writ (now claim form), which alleged that the arranging bank was liable for deceit, misrepresentation under section 2(1) of the Misrepresentation Act 1967, and negligence in marketing the syndicated loan as being 'attractive financing to two companies in a sound and profitable group', when in fact the borrower subsequently defaulted on the loan. In considering the arranging bank's relationship with the syndicate banks, Ackner LJ stated:[3]

> 'The transaction into which [the claimant bank] was invited to enter, and did enter, was that of contributing to a syndicate loan where, as seems to us, quite clearly [the defendant bank was] acting in a fiduciary capacity for all the other participants. It was [the defendant bank] who received [the claimant bank's] money and it was [the

superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved'.

[1] [2011] EWCA Civ 133; [2012] 1 All ER (Comm) 268.
[2] See [78]-[98] and in particular [94].

13.22 The law on non-reliance clauses and on claims for pre-contractual misrepresentation has been developed considerably in recent years by the Court of Appeal in two cases: *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*[1]; and *JP Morgan Chase Bank v Springwell Navigation Corp*[2]. Full consideration of these and other authorities may be found in Chapter **29** Section 2 of the present work, which deals with the sale of investments by a bank.

[1] [2006] EWCA Civ 386.
[2] [2010] EWCA Civ 1221.

5 ILLEGALITY, INCAPACITY AND MISTAKE

13.23 These three remaining categories of vitiating factors may be shortly dealt with together.

(a) Illegality

13.24 Although generally any kind of property can be mortgaged, this rule is subject to a number of exceptions, mostly on the grounds of public policy. Thus a public office or the pay of public officers cannot be mortgaged: *Grenfell v Dean & Canons of Windsor*[1]. A mortgage may also be held unenforceable because of the illegality of the underlying transaction: *Fisher v Bridges*[2].

[1] (1840) 2 Beav 544 at 549
[2] (1853) 3 E&B 642.

(b) Incapacity

13.25 Mortgage agreements are subject to the usual rules regarding the capacity of parties. So an individual who is a minor, or a bankrupt, or who suffers from some mental disorder may not mortgage property, and a company's powers of mortgage may be limited by its memorandum and articles of association.

(c) Mistake

13.26 As with other contracts, a mortgage agreement may be rectified in a case of common or mutual mistake as to the true construction of its terms, so as to give effect to the true intention of the parties. The requirements for a court to grant this equitable remedy are that: (i) there existed some prior agreement whereby the parties expressed a common intention; (ii) this common intention continued until the execution of the written contract; (iii) this written instrument incorrectly recorded the parties' true agreement; and

(iv) if rectified in the manner claimed, the instrument will give effect to this intention. Rectification may also be ordered in a case of unilateral mistake – but only in two particular instances. First, where the claimant's mistake was induced by the counterparty's fraud (which may include constructive fraud)[1]. Secondly, where the defendant was aware of the claimant's mistake, but said nothing and executed the instrument. This is regarded as a form of unconscionability, which gives rise to an equitable estoppel in favour of the mistaken party, and against the party seeking to take advantage of the mistake.

[1] *Lovesy v Smith* (1880) 15 Ch D 655.

13.27 A mortgage may also be voidable under the doctrine of non est factum, whereby a party establishes that the document he executed was so radically and fundamentally different from that which he thought he signed, that it was not his intention to execute it. The doctrine is now rarely invoked successfully, and mere negligence in failing to ascertain the meaning of the document does not constitute a defence. So in *Saunders v Anglia Building Society*[1], an elderly widow failed to read a document which she executed in the belief that it was a deed of gift of a property to her nephew, when in fact it was an assignment to a third party. The House of Lords rejected a plea of non est factum in a dispute between the claimant widow and a lender who had innocently lent money on the strength of the document. The claimant had known that she was signing a legal document, and although she was mistaken as to its terms, she had not taken the trouble to read it so as to ascertain even its general effect.

[1] [1971] AC 1004.

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6 STATUTORY REGULATION

(a) Registration of Security Interests

(i) Registration of Charges over Shares and Book Debts

13.28 The statutory regime for the registration of security interests in a company's shares or book debts has undergone significant change in recent years, as a result of changes introduced first by the Companies Act 2006 (CA 2006), and then (from 6 April 2013) by the substantial revision of Part 25 of the CA 2006 effected by the Companies Act 2006 (Amendment of Part 25) Regulations 2013, SI 2013/600. A summary of the position appears below; a more detailed account can be found in specialist works on company law (eg, *Palmer's Company Law* (Looseleaf) Part 6).

Under the old CA 2006 regime, charges (fixed or floating) over shares were not among the charges specified as 'registerable' under s 860(7), although charges on book debts were. A failure to register a charge over shares did not therefore constitute a criminal offence by the company or its defaulting officers under s 860(4), or result in the charge being void against the company's liquidator, administrator or creditor under s 874(1).

Under the new regime (set out in Chapter A1 at the beginning of Part 25 of the CA 2006), the registration of fixed or floating charges (including mortgages) over shares or book debts[1] by the company itself or by the secured party is

the bank, to decide how to run its business[5]. As in *Brumark* it was accepted that it was permissible, indeed necessary, to enquire to what extent control had in fact been exercised.

Their Lordships were unanimous in holding that the purported fixed charge over books debts was to be characterised as floating charge. *Siebe Gorman & Co Ltd v Barclays Bank Ltd*[6], in which Slade J upheld a fixed charge over book debts, was overruled, not on the ground that the judge had misstated the relevant principles of law, but on the ground that he had misapplied those principles to the facts. The Court of Appeal's decision in *Re New Bullas Trading*[7] was also overruled.

1 [2005] UKHL 41, sub nom *Re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680.
2 [2005] 4 All ER 209, HL at [79].
3 At [61].
4 At [106], [107], [110] and [111].
5 At [138] and [139].
6 [1979] 2 Lloyd's Rep 142.
7 [1994] 1 BCLC 485.

(iv) Priorities

15.6 Where a mortgage or charge is taken without notice of a prior encumbrance, the priorities between competing mortgages and charges over book debts appear to be governed by the date on which notice of the mortgage or charge is given to the debtor. This principle derives from four propositions:

(1) Priority between competing equitable assignments of choses in action is governed by the date of notice to the debtor[1].
(2) By s 136(1) of the Law of Property Act 1925, notice in writing to the debtor is a requirement for a legal assignment of a chose in action, and therefore in practice the priority between competing legal assignments is also governed by the date of such notice.
(3) By s 136(1) a legal assignee takes subject to equities, and accordingly, even if a legal assignment is effected for value without notice of a prior equity, priorities between an equitable assignee and a subsequent legal assignee fall to be determined as if both assignments had been equitable[2].
(4) Although an equitable charge over a debt is created without any immediate assignment to the chargee, the chargee obtains an immediate proprietary interest such that the reasoning which underlies the rule in *Dearle v Hall* applies with the same force as to an immediate assignment.

1 *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 at 162, followed in *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602, 617 (Mummery J).
2 See fn 1 above, followed in the *Compaq* case at 621.

(v) Further advances

15.7 The existence of a mortgage or charge does not necessarily confer protection in relation to advances made after notice of a subsequent charge. Whether a charge has priority in relation to such advances depends upon the

chargor's right to 'tack' subsequent advances on to his security. The subject of tacking is more fully considered in Chapter 32 below, in the context of mortgages over interests in land. The uncertainties over the construction of s 94 of the Law of Property Act 1925 are compounded in relation to mortgages over book debts by doubts as to the application of s 94 to mortgages other than mortgages of land.

(b) Mortgages and charges of debts in favour of the debtor

15.8 Despite earlier controversy, it can now be taken to be settled that it is possible for a person to take security by way of a charge over a debt he owes. In its simplest form, a bank may take a charge over a credit balance upon an account held with it by the debtor.

In *Re Charge Card Services Ltd*[1], Millett J held that a creditor cannot create in favour of a debtor a charge over the debtor's own indebtedness to the chargor. A 'charge' of this type is sometimes called a 'charge-back', ie a charge by a creditor back in favour of a debtor. Millett J described such a charge as 'conceptually impossible'.

The decision in Charge Card proved controversial. It generated strong divisions of opinion among legal writers. It was doubted, obiter, by Dillon LJ in *Welsh Development Agency v Export Finance Co Ltd*[2], but approved by the Court of Appeal (in a judgment to which Millett LJ contributed) in *BCCI (No 8)*[3].

The debate was finally resolved by the House of Lords in *BCCI (No 8)*[4]. The charge in question was a charge by a depositor to secure the liabilities of a third party borrower. The charge provided:

> 'In consideration of [*BCCI*] at our request providing from time to time facilities to [*Rayners*] ("the borrower") from time to time, I . . . hereby give a lien/charge on the balances maintained by me in my accounts with you for all of the outstanding liabilities of the borrower in respect of the banking facilities . . . '[5]:

Lord Hoffmann, delivering the only judgment, first identified the following normal characteristics of an equitable charge:

(1) An equitable charge is a species of charge, which is a propriety interest granted by way of security.
(2) A proprietary interest by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him (whether from the person providing the security or a third party).
(3) The method by which the holder of the security will resort to the property will ordinarily involve its sale or, more rarely, the extinction of the equity of redemption.
(4) A charge is a security interest created without any transfer of title or possession to the beneficiary.
(5) An equitable charge can be created by an informal transaction for value and over any kind of property (equitable as well as legal) but is subject to the doctrine of purchaser for value without notice applicable to all equitable interests[6].

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the original advance.

[1] Thus the doctrine of *tabula in naufragio* ('the plank in the shipwreck') which, as between competing equitable mortgagees, enabled the mortgagee who acquired a legal estate in the mortgaged property to prevail over the other was abolished by the LPA 1925. The doctrine remains important for resolving conflicts between other equitable interests, eg, *McCarthy & Stone Ltd v Julian S Hodge Ltd* [1971] 1 WLR 1547.

17.37 But written notice aside, registration on some public registers is deemed to be notice to the whole world. The effect of ss 197 and 198 of the LPA 1925 is to affix the original lender with deemed actual notice of everything which is registered as a land charge. This deemed actual notice is just as much notice for the purpose of s 94(1) as if the later lender had given actual written notice. Therefore, subject to what is said below in relation to s 94(2), an original lender proposing to make a further advance on the security of an existing mortgage of unregistered land should always make a search of the land charges register in case something has been registered which will stop it tacking the further advance.

Section 94(1), on its own, would cause problems for banks. It would mean that a bank could not rely on the security it took for its lending on fluctuating accounts unless it made a search before it honoured each cheque or made each advance. Section 94(2) was amended to deal with this situation. It is sometimes called 'the Banker's clause'. As amended by the Law of Property (Amendment) Act 1926, it provides that:

> 'In relation to the making of further advances after 1st January 1926 a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge . . . if it was not so registered at the time when the original mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.
>
> This sub-section only applies where the prior mortgage was made expressly for securing a current account or other further advances.'

Therefore as long as the mortgage provides expressly that it is made to secure a current account or other further advances and the original lender has done a search in the land charges register at the outset and has not found any mortgages registered as land charges, s 94(2) would appear to have it that the original lender is not going to be prejudiced by later mortgages until it has actual notice of them or does another search and finds out about them that way[1].

[1] Section 94(2) is another key section that has not been seriously tested in the courts and about which there has long been speculation which the legislature has not taken the trouble to dispel. See (1958) 22 Con (NS) 44 (Rowley).

8 OVERRIDING INTERESTS

(a) Land Registration Act 1925

17.38 In their commentary on the Bill which became the LRA 2002, the Law Commission and HM Land Registry said:

> 'The fundamental objective of the [LRA 2002] is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.'[1]

In doing so they were addressing one of the fundamental issues of land registration, which is the problem of satisfying the twin objectives of alienability and fragmentation. Putting it another way, there is a public interest in having secure legal titles which can be investigated and transferred simply and straightforwardly. However there is a private interest in having interests, rights and obligations which do not appear on the register upheld both against the registered proprietor and its transferees. The stance taken by the legislature in the LRA 2002 was unequivocally in favour of the primacy of the register.

One of the areas where the LRA 1925 was least effective was in its handling of what are referred to in the LRA 1925 as 'overriding interests'. These are interests which, although not appearing on the register, bind third parties such as purchasers, tenants and lenders. Section 70(1) of the LRA 1925 contained a list of thirteen kinds of overriding interests. They included local land charges, leases granted for less than twenty-one years and certain kinds of easements. They also included some rather more esoteric interests such as the liability to maintain the chancel of the local church[2], fishing and sporting rights and payments in lieu of tithes. What all these had in common was that in the system of unregistered land they were all interests which would not necessarily be apparent from the title deeds. They may well not have been apparent on an inspection of the property either. The purchaser or the lender could carry out the most exhaustive enquiries and still find itself bound by an overriding interest which it had been unable to discover.

As far as lenders were concerned, the overriding interest that caused the most difficulty was that referred to in s 70(1)(g) of the LRA 1925. This preserved:

> 'The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.'

This was an example of the LRA 1925 reflecting the law as it related to unregistered land, in this case, the rule in *Hunt v Luck*[3]. The rule was that if the third party visited the property and found someone there other than the legal owner, the third party was put on notice that something might be wrong and he ought to start asking questions. If the third party did not visit the property or did not ask questions he was nevertheless deemed to have constructive notice of whatever rights the occupier might have had and he took subject to them. The occupier's rights would bind the third party even though they were not registered.

[1] Law Com no 271, 1.5.
[2] See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 All ER 1213.
[3] [1902] 1 Ch 428.

17.39 It was against this background that the *Williams & Glyn's v Boland*[1] litigation came to court. The bank had agreed to make cash available to Mr Boland for the purpose of his business and it required him to mortgage the matrimonial home by way of security. The legal title to the house was registered at HM Land Registry solely in his name so his wife did not have to

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Provisions) Order 2010 (SI 2010/18) – and the unmodified form applies where the resolution to wind up was passed before 6 April 2010: see art 12).

[8] IA 1986, ss 95, 98 and 102. Again, the creditors' choice of liquidator will prevail.

20.44 After the passing of the resolution the company must cease to carry on its business, except so far as may be required for the beneficial winding up of the company[1]. On the appointment of a liquidator the powers of the directors cease, except where authorised by the company in general meeting or the liquidator in a members' voluntary winding up[2], or by the liquidation committee of the creditors in a creditors' voluntary winding up[3]. Accordingly, cheques drawn by directors or other instructions given by them after the liquidator is appointed are not binding on the company[4]. It has been argued that the directors may bind the company after the resolution has been passed but before the liquidator is appointed. However, this is extremely unlikely, because the standard form of resolution to wind up a company includes the appointment of a liquidator. A bank discovering that a meeting has been called to consider a resolution to wind up the company should freeze all of the company's bank accounts, provided that it is entitled to do so on the relevant agreements between the bank and the company.

[1] IA 1986, s 87.

[2] IA 1986, s 91(2).

[3] IA 1986, s 103.

[4] *Re London and Mediterranean Bank, Bolognesi's Case* (1870) 5 Ch App 567.

(b) Compulsory winding up

20.45 The court has power to wind up a company incorporated under the Companies Acts in any of the circumstances specified in the IA 1986, s 122(1)[1]. However, in the case of a company with its centre of main interests within the EU, the company may only be wound up by the English court if its centre of main interests is in England and Wales or if it has an establishment in England and Wales[2]. It should also be noted that where a debtor is in liquidation in another Member State where its centre of main interests is as 'main proceedings', then its insolvency is automatically established for the purpose of any 'secondary proceedings' in England and Wales[3].

An unregistered company or partnership may be wound up in any of the circumstances specified in the IA 1986, s 221(5), and in the case of a partnership, upon certain further grounds set out in the Insolvent Partnerships Order[4]. The most usual ground upon which a winding-up petition is presented is that the company is unable to pay its debts (and that is deemed to be so if the company fails to comply with a statutory demand[5]). A company is also deemed to be unable to pay its debts if it is proved that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities[6].

[1] They are: (a) the company has by special resolution resolved that the company be wound up by the court; (b) being a public company which was registered as such on its original incorporation, the company has not been issued with a certificate under the Companies Act 1985, s 117 (public company share capital requirements) and more than a year has expired since it was so registered; (c) it is an old public company, within the meaning of the Consequential Provisions Act; (d) the company does not commence its business within a year from its incorporation or suspends its business for a whole year; (e) the number of the members is reduced below two; (f) the company is unable to pay its debts; and (g) the court is of the opinion that it is just and equitable that the company should be wound up.

[2] See further para **19.3** above.

[3] EC Regulation, art 27.

[4] See the IA 1986, s 221 in relation to unregistered companies. The circumstances are: (a) if the company is dissolved or has ceased to carry on business; (b) if the company is unable to pay its debts; (c) if the court is of the opinion that it is just and equitable that the company should be wound up. The circumstances in which an overseas company will be wound up in England were considered in *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112; *Re Cia Merabello San Nicholas SA* [1973] Ch 75; *Re a Company (No 00359 of 1987)* [1988] Ch 210; *Re Eloc Electro-Optiek and Communicatie BV* [1982] Ch 43; *Re a Company (No 007946 of 1993)* [1994] Ch 98; *Re Latreefers Inc, Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116, CA; *Banco Nacional de Cuba v Cosmos Trading Corpn* [2000] 1 BCLC 813; *Atlantic and General Investment Trust Ltd v Richbell Information Services Inc* [2000] 2 BCLC 778; *Banco Nacional de Cuba v Cosmos Trading Corpn* [2000] 1 BCLC 813, CA. See also *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), [2004] 1 All ER 903. In the context of a public interest petition against an unregistered company which failed because there was an insufficient connection between the company and the UK see *Re Titan International Inc* [1998] 1 BCLC 102. See Insolvent Partnerships Order 1994 (SI 1994/2421) regs 7, 8 and 12 and Schs 3 and 4 in relation to partnerships.

[5] IA 1986, s 123. Note that a statutory demand must be 'served . . . by leaving it at the company's registered office' (IA 1986, s 123(1)(a) and must be in hard copy: IA 1986, s 436B(2)(d). A statutory demand must not be served on a solvent company or in order to recover a disputed debt: *Re a Company (No 0012209 of 1991)* [1992] 1 WLR 351; *Re Ringinio Ltd* [2002] 1 BCLC 210. A cross claim which is genuine, serious or has substance will be sufficient to establish a disputed debt: *Re Bayoil SA* [1999] 1 BCLC 62; *Orion Marketing Ltd v Media Brook Ltd* [2002] 1 BCLC 184.

[6] IA 1986, s 123(2) – as to the meaning of which, see *BNY Corporate Trustee Services Ltd v Eurosail-UK-2007-3BL plc* [2013] UKSC 28, [2013] 1 WLR 1408, [2013] 3 All ER 271, [2013] 2 All ER (Comm) 531, [2013] Bus LR 715, [2013] BCC 397, [2013] 1 BCLC 613.

20.46 A compulsory winding up is deemed to begin at the time of the presentation of the petition, or if a voluntary resolution had previously been passed, from the time when that resolution was passed[1]. A banker's position will often be affected by the presentation of the petition by virtue of IA 1986, s 127 which provides:

> 'In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.'[2]

Until the Court of Appeal's decision in *Hollicourt (Contracts) Ltd v Bank of Ireland*[3] it was thought that both payments into and payments out of a bank account were void[4]. However, it is now clear that this view was based upon an over-simplification of the effect of s 127. Payments into a bank account which is in credit are not dispositions of the company's property since the funds remain the company's and do not go to reduce a debt owed to the bank[5]. As regards payments made out of a bank account, whilst such a payment is a disposition in favour of the creditor, it is not a disposition of the company's property in favour of the bank. The bank is merely acting as the company's agent and the avoidance of the disposition in favour of the creditor does not affect the validity of the intermediate or related transactions, such as the bank honouring the company's cheque[6]. Mummery LJ, giving the judgment of the Court of Appeal, said[7]:

> '. . . section 127 only invalidates the dispositions by the company of its property to the payees of the cheques. It enables the company to recover the amounts disposed of, but only from the payees. It does not enable the company to recover the

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(l) The bank's limitation defence

22.79 In the case of a credit balance on a customer's current account the period of limitation is six years from the date when demand for repayment has been made[1]. It follows that limitation does not run on dormant accounts[2].

In *Bank of Baroda v Mahomed*[3], the question arose whether a customer could refresh the six year limitation period, by making fresh demands (each of which would have a six-year limitation period). The Court of Appeal decided that this would circumvent sections 5 and 6 of the Limitation Act 1980 ('the Act'), and so deprive banks (and indeed all debtors) from the protection of the Act. However, where the banking relationship remains alive, there is no bar on a customer retracting its extant demand and making a subsequent demand. The effect of this is that, in order to rely on a limitation defence, a bank must normally have taken steps to terminate its contract with the customer.

If the banker/customer relationship is terminated before a demand is made, the moneys become repayable upon such termination[4].

Where the customer wishes to challenge a debit to his or her account (for example, because she alleges that she did not authorise a particular payment), limitation begins to run only when demand is made by the customer of the amount wrongly debited, and not on the date of the (mistaken) debit[5]. This is because the claim is in reality for repayment of a debt said to be owed in full (ie the amount standing to the customer's credit, without deduction of the disputed debit), as opposed to a claim that the wrongful debit is a breach of contract giving rise to a right to damages. As it was put by Staughton J in *Limpgrange Ltd v Bank of Credit and Commerce International SA*[6]:

> 'It was pleaded in the Points of Claim that, in breach of contract and of their duty of care, (the bank) had wrongly debited the company's account with the amounts of the disputed transfers, and that the company had thereby suffered loss and damage. Strictly speaking, it seems to me that those are unnecessary averments. If debits were made without authority they should be disregarded, and the company can claim as money owed to it by (the bank) the credit balance remaining when those debits are left out of account, or if there would still be an overdraft, the company would be liable to (the bank) only for such amount as the account was overdrawn after deletion of the disputed debits.'

1 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110. In the case of a credit balance on a customer's deposit account the period of limitation will begin to run when the prescribed period of notice of withdrawal has elapsed after demand or, in the case of a time deposit, when the agreed deposit period expires.
2 Under the Dormant Bank and Building Society Accounts Act 2008, a bank or building society is entitled to transfer the balance of a dormant account to an authorised reclaim fund, after which the customer no longer has any right against the bank or building society, but has the same right against the reclaim fund. An account is 'dormant' if (subject to exceptions) there have been no transactions within the past 15 years by or on behalf of the account holder (see section 10(1)). Reclaim funds remain theoretically liable for the repayment of dormant accounts, but can make distributions to good causes.
3 [1999] 1 Lloyd's Rep Bank 14, 19, CA. The decision concerned a time deposit account that was repayable on maturity and upon demand. See also *Das v Barclays Bank plc* [2006] EWHC 817 (QB) at para 37 (Calvert Smith J).
4 *Re Russian Commercial Bank* [1955] Ch 148.
5 *National Bank of Commerce v National Westminster Bank* [1990] 2 Lloyd's Rep 514.
6 [1986] FLR 36.

4 THE COMPLETION OF PAYMENTS

(a) Introduction

22.80 Determining the time of completion of payment as between originator and beneficiary can be important in certain circumstances, eg where the originator attempts to revoke a payment instruction; where the death, liquidation or bankruptcy of the originator terminates the bank's authority to pay; where the contract between originator and beneficiary requires payment to be made strictly on the due date; where it is necessary to determine the time of payment for taxation purposes, or for the calculation of interest; or where there is a failure of one of the banks involved[1].

1 See generally, J Vroegop, '*The time of payment in paper-based and electronic funds transfer systems*' [1990] LMCLQ 64; B Geva, '*Payment into a Bank Account*' [1990] 3 JIBL 108; B Geva, *Bank Collections and Payment Transactions – Comparative Study of Legal Aspects* (2001, OUP), pp 270–289.

22.81 This section of the chapter will concentrate on completion of payment by credit transfer. The main difference between credit and debit transfers is that it is the originator (usually the beneficiary's debtor) who initiates a credit transfer by instructing his bank to make payment, whereas it is the beneficiary (usually the originator's creditor) who initiates a debit transfer by instructing his bank to request payment from the originator's bank[1]. In a debit transfer, where the beneficiary requests funds from the originator's account, the beneficiary's bank is acting as an agent for the beneficiary in the collecting process. The position is less certain in the case of a credit transfer. The cases suggest that the beneficiary's bank again acts as an agent of the beneficiary[2]. However, there is academic argument that the relationship is one of banker/customer[3].

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1 The language of 'originator' and 'beneficiary' becomes somewhat strained in the context of a debit transfer as it is the beneficiary who initiates the transfer. This is not surprising as the terminology was developed for use in credit transfers and not debit transfers. Nevertheless, for the sake of consistency, the same terminology is applied to both credit and debit transfers in this chapter.
2 See especially *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1976] QB 835, CA, 847 per Lord Denning; [1977] AC 850, HL, 871 per Lord Wilberforce (with whom Lord Simon agreed), and 880 per Lord Salmon. See also *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep 194, 198–199, 201–203, per Webster J. From overseas, see *Delbrueck v Manufacturers Hanover Trust Co* 609 F 2d 1047 (1979), 1051–1052 (2nd Cir); *Dovey v Bank of New Zealand* [2000] 3 NZLR 641, 649 (NZCA).
3 R King, '*The Receiving Bank's Role in Credit Transfer Transactions*' (1982) 45 MLR 369.

22.82 There are three good reasons why the beneficiary's bank should be deemed to act as the beneficiary's agent in a credit transfer[1]. First, if the beneficiary's bank is not acting as the beneficiary's agent then the originator's bank transfers funds to someone who is not authorised to receive them. The transfer of funds to an unauthorised person would not discharge the originator's underlying indebtedness to the beneficiary[2]. Secondly, treating the beneficiary's bank as the beneficiary's agent is consistent with the rule that payment is complete as between originator and beneficiary on receipt of funds and before a credit is posted to the beneficiary's account. Thirdly, failure to regard the beneficiary's bank as the beneficiary's agent draws an unnecessary distinction between payment by credit transfer and payment by debit transfer

(1) As against the payee, the drawer will probably have failed to discharge his liability because the payee will never have received the cheque.
(2) As against the paying bank, the drawer is unlikely to be able to challenge the debit to his account under BEA 1882 s 80[1]. Just as before the 1992 Act, the paying bank is likely to establish a statutory defence because the process of cheque clearing does not inform the paying bank to whom the collecting bank has paid the proceeds. This is why the words account payee have always been treated as a direction to the collecting bank rather than the paying bank.
(3) As against the collecting bank, whether a thief obtains the proceeds by opening an account in the false name of the payee, by paying the cheque into an account in a different name, or by fraudulently altering the name of the payee, any issues about conversion and the availability of the collecting bank's statutory defence should be decided in the same way as they would have been before the 1992 Act[2].

[1] See para **26.32** below.
[2] See Chapter **27**.

(c) Other crossings

26.12 There are other forms of crossing available to the drawer of a cheque, as set out in BEA 1882 ss 76-81 and the Cheques Act 1957, s 4. In summary, their effect is to require that the paying banker pay only to another banker (ie to make payment only to a 'collecting bank' collecting on behalf of their customer, rather than to make payment in cash to the person presenting the cheque). Payment contrary to the crossing would be negligence on the part of the banker, so that if the customer suffered loss, the banker would be unable to charge the customer[1], or a breach of mandate, so the bank is not entitled to debit its customer's account with the amount paid[2].

Except in rare cases, these have been superseded by the account only crossing. The reader is referred to previous editions of this text, or the specialist texts on cheques and bills of exchange if further detail is required[3].

[1] *Bellamy v Marjoribanks* (1852) 7 Exch 389.
[2] The crossing constitutes an instruction as to how the cheque should be paid and to that extent alters the bank's mandate: *Smith v The Union Bank of London* [1875] 1 QBD 31, 35.
[3] Elliott, Odgers, Phillips *Byles on Bills of Exchange and Cheques* (29th edn, 2013), *Guest Chalmers and Guest on Bills of Exchange, Cheques, and Promissory Notes* (17th edn, 2009).

4 THE BANK'S OBLIGATION TO MAKE PAYMENT

26.13 A bank is obliged to pay its customer's cheques as it is obliged to comply with any valid payment orders. See para **22.50** ff above for the general law. This section deals with the particular requirements which must be complied with for the bank to be obliged to pay cheques.

(a) Regular and unambiguous in form

26.14 The cheque must be regular and unambiguous in form. The judgments both in the *Macmillan*[1] and the *Joachimson*[2] cases explicitly declare that it is

part of the contractual relationship that the customer shall issue, and the banker receive his mandate, embodied in the cheque, in plain, unmistakable terms. In the *Macmillan* case Lord Haldane said[3]:

> 'The customer contracts reciprocally that in drawing his cheques on the banker he will draw them in such a form as will enable the banker to fulfil his obligation, and therefore in a form that is clear and free from ambiguity.'

and:

> 'The banker as a mandatory has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called on to do.'

As regards ambiguity in the mandate, the recognised rule is that an agent who has adopted a reasonable course in face of ambiguity in the principal's instructions cannot be made liable whether such ambiguity arises from the method of expression or the medium of communication[4]. The banker is entitled to the benefit of this rule, but must also bear in mind the limits to its operation, including (1) that once a person enters into a contract he is bound by its terms, which, in the event of dispute, will fall to be construed objectively; (2) that a party relying on his own interpretation of the relevant instrument must have acted reasonably in all the circumstances in so doing, and, if the ambiguity is patent on the face of the document, it may well be right, especially with the facilities of modern communications, for an agent to have his instructions clarified by his principal, if time permits, before acting on them[5].

It was recognised in the *Macmillan* case that the customer has no right to put upon the banker, and the banker is not bound to accept, any risk or liability not contemplated in or essentially arising out of the ordinary routine of business.

The rights of the banker to decline unusual risks, clearly recognised since the *Macmillan* case, are not confined to those arising directly from ambiguity of the mandate. It is a fair reading of the contractual obligation that not only shall the customer not impose, but the banker need not undertake, exceptional risks. In banking practice contingencies arise where, in the interests of banker and customer alike, the only reasonable course is to 'postpone' payment in appropriate and innocuous terms, as for instance where a cheque or draft is negotiated abroad and on which appears a special indorsement in Arabic or Oriental characters, conveying absolutely nothing to the drawee bank. By issuing such a cheque the customer must be taken to empower the banker to act reasonably for his own protection in any contingency such as foreign negotiation which may arise in connection with the cheque.

The dictum of Maule J in *Robarts v Tucker*[6] that a banker might defer payment of a bill until he had satisfied himself that the indorsements thereon were genuine was expressly disapproved by the House of Lords in *Vagliano's* case[7]. Lord Macnaghten said that a banker must pay off-hand and as a matter of course bills presented for payment, duly accepted and regular and complete on the face of them. A bank might seek telephone confirmation from the drawer of the authenticity of cheques above a certain amount, but the mere unavailability of the drawer cannot justify a delay in payment.

Ungoed-Thomas J in *Selangor United Rubber Estates v Cradock (No 3)*[8] recognised:

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only apply in COB where the client is a private customer as opposed to an intermediate customer or market counterparty. Here, the claimants claimed for breach of COB 5.3.5R on the basis that there had been investments recommended which were unsuitable, and COB 5.4.3R on the basis a personal recommendation had been given without ensuring the claimants understood the risks involved. However, the claimants were held to have been properly classified as intermediate customers, such that these obligations did not arise in the first place. Eady J expressed the approach the court should take upon an allegation of misclassification of a customer as an intermediate customer, in the following terms[2]:

> '. . . the court is not concerned to come to its own separate and objective assessment of the 'correct' classification. The test is whether reasonable care has been taken to determine that the client had sufficient experience and understanding to be classified as an intermediate customer'.

This has some relevance to COBS, as although the COBS suitability obligation extends to all clients (of any classification) within the MiFID scope, where the product in respect of which advice is provided falls outside the MiFID scope (eg a pension), then the suitability obligation only extends to retail clients properly so classified under COBS, and proper classification is critical.

1 [2011] EWHC 138 (QB).
2 Ibid. para 24. See also on the importance and process of proper classification *Spreadex Ltd v Sekhon* [2008] EWHC 1136 (Ch), [2009] 1 BCLC 102, *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), and *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm), [2011] 1 CLC 454.

29.22 The COBS suitability obligation at 9.2.1R was considered in detail in *Zaki v Credit Suisse*[1]. The claimant had purchased various different types of notes, and Teare J had to consider the question of suitability in respect of each. In doing so, the Court considered the three factors of

(a) the client's knowledge and experience;
(b) financial situation; and
(c) investment objectives as set out in COBS 9.2.1R(2).

Ostensibly as part of this, most likely as part of the client's investments objectives, Teare J accepted that the Court could have regard to whether the recommended products were riskier than desired by the client or were insufficiently diversified; and of further relevance was the suitability of the leverage used in the recommended investments[2]. Although the approach of Credit Suisse to collecting and storing information about the claimant may have been in technical breach of regulatory requirements in COBS, it was held this did not affect the question of whether the products recommended were in fact suitable or not (although it would potentially have relevance to the question of whether the reasonable care required by COBS 9.2.1R had been exercised, should the product have been unsuitable).

As to this question of suitability, 7 of the 10 notes were held suitable, based on the claimant's understanding of the structure of the notes, the risks associated with them and because they fitted with the claimant's desire for higher returns. The remaining notes were held unsuitable because they were more highly leveraged, in an already undiversified portfolio and were exposed to banking shares at a time when they were already falling. However, the claim on these

notes failed in any event for it could not be shown the claimant had relied on the advice given. While no longer present in COBS, the obligation in COB to give advice on the 'most suitable' product on 'packaged products' was considered in *Rubenstein v HSBC*[3]. In this case, as the product was an investment sold in a life policy wrapper, it met the definition of packaged product and attracted the higher obligation under COB 5.3.5R(2)(a).

In these circumstances the test of suitability is more easily established, namely identifying and examining the products within the bank's scope. If there is a more suitable product there is a breach. In this case money was desired to be held at very low risk as a paramount concern, and as there was a lower risk product available within the scope, it was held there was a breach of COB 5.3.5(2)(a). A finding by the judge that the claim failed because the loss was caused by a rumour during the 'credit crunch' that the product provider, AIG, would collapse, was unforeseeable in September 2005 as unthinkable, was overturned on appeal[4]. The loss was not too remote as the claimant made it clear he wanted a no-risk investment and so any market loss fell within the scope of the bank's duty.

1 [2011] EWHC 2422 (Comm), [2011] 2 CLC 523. Affirmed [2013] EWCA 14; [2013] 2 All ER (Comm) 1159.
2 Ibid. paras 112, 122. The requirement to consider suitability of leverage is strictly separate from that in COBS 9.2.1R, being based on requirements contained in COBS 7.9. The requirements of COBS 7.9 were considered in detail on appeal op cit.
3 [2011] EWHC 2304 (QB), [2012] PNLR 7.
4 See [2012] EWCA Civ 1184 at paras 118, 120-125.

8 ADVICE ON INSURANCE: ICOB & ICOBS

29.23 Banks' role in advising on insurance[1] can only be one of intermediary rather than as insurer themselves[2].

While effecting or carrying out insurance has been regulated under FSMA since its inception, it was not until 14 January 2005, following implementation of the Insurance Mediation Directive[3] (IMD), that the scheme of regulated activities under FSMA was extended to include insurance mediation of non-investment insurance[4] by way of business in the United Kingdom. This 'by way of business' test was modified, reflecting the IMD, in relation to insurance mediation activities, to require that the intermediation be for 'remuneration'[5].

The regulated activities included in the regulator's definition of 'insurance mediation activities' include advising on investments[6]. When considering insurance, strictly these regulated activities apply in relation to 'rights under a contract of insurance'[7], and therefore extend to an alteration or addition of rights under an existing contract of insurance. This is subject to a number of exceptions contained in the RAO[8].

In tandem with this extension of regulation, the regulator introduced specific conduct of business requirements on such insurance intermediaries contained in the Insurance: Conduct of Business (ICOB) sourcebook. On 5 January 2008 ICOB was replaced with the Insurance: Conduct of Business Sourcebook (ICOBS), subject to a set of transitional provisions which allowed insurance intermediaries to continue to comply with ICOB instead of ICOBS until 6 July 2008[9]. This change was made following a review of ICOB which

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The balance of convenience was between impeding the New York court in the exercise of powers considered excessive by English standards and causing very considerable commercial harm to the plaintiffs by not continuing the injunctions: the injunctions were continued[3].

The point of principle arose in more acute form in *FDC Co Ltd v Chase Manhattan Bank NA*[4], where the parties agreed that the hearing of an application for an interlocutory injunction should be treated as the trial of the action. The case arose out of a subpoena issued by the New York District Court addressed to the defendant Bank in New York, but aimed at information within the jurisdiction of the Hong Kong courts. The Hong Kong Court of Appeal granted a final injunction restraining the bank from complying with the subpoena. It held that disclosure did not fall within any of the four exceptions to the duty of confidentiality stated in *Tournier's* case. In dealing with the exception which permits disclosure by compulsion of law, Silke JA observed that the compulsion had to be that of the law of Hong Kong, ie the law governing the relevant account. Applying *R v Grossman*, above, the court treated the Hong Kong branch of the bank as a separate entity from the head office in New York.

In *Pharaon v BCCI*[5], Rattee J held that the public interest in upholding the duty of confidentiality between bank and customer was subject to being overridden by the greater public interest in making confidential documents relating to the alleged fraud of an international bank available to the parties to private foreign proceedings for the purpose of uncovering that fraud. However, such disclosure should be limited to what is reasonably necessary to achieve the purpose of the public interest in disclosure.

1 [1983] 2 All ER 464, [1983] 2 Lloyd's Rep 535.
2 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504.
3 [1983] 2 All ER 464.
4 (1984) unreported, Hong Kong CA.
5 [1998] 4 All ER 455.

5 ORDERS UNDER THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT 1975

33.13 The Hague Convention was implemented in England and Wales by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the 'Act'). The Act empowers and requires the English High Court to assist foreign courts in other Contracting States in civil or commercial proceedings by enabling evidence to be taken from witnesses in England and Wales for the purposes of the foreign proceedings.

By ss 1 and 2(1) of the Act[1], where an application is made to the High Court, the court has power by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to it to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made.

The court must be satisfied (1) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction in any other part of the United Kingdom or in a country

or territory outside the United Kingdom; and (2) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.

The manner in which the court's discretion should be exercised in relation to evidence the production or giving of which would lead to disclosure by a bank of confidential information relating to a customer was considered by the Court of Appeal in *Re State of Norway's Application*[2]. The position was summarised by Kerr LJ as follows[3]:

> 'The court must carry out a balancing exercise. In the scales on one side must be placed the desirable policy of assisting a foreign court, in this case supported by both parties to the litigation before it. On the other side there is the opposing principle that the court will give great weight to the desirability of upholding the duty of confidence in relationships in which, as here, it is clearly entitled to recognition and respect. Which way the balance then tilts depends upon the weight which is properly to be given to all the other circumstances of the case.'

On the facts of the case, the request was held to be in the nature of a roving investigation which might affect the private financial affairs of unknown persons who were entitled to expect that the highly reputable merchant bank to which they had entrusted their affairs would never be compelled to disclose those affairs except in circumstances of allegations of fraud or crime[4]. Exercising the discretion afresh, the Court of Appeal, by a majority, refused to accede to the request. However, in *Re State of Norway's Application (No 2)*[5], the House of Lords upheld a redrafted request. Lord Goff, delivering the leading speech, recorded that both sides accepted that the question of confidentiality could only be answered by the court undertaking a balancing exercise of the sort described by Kerr LJ[6].

In *First American Corp v Sheikh Zayed Al-Nahyan*[7], it was held that the court should, where appropriate, accede to a letter of request issued by a foreign court seeking evidence for use in foreign proceedings, particularly where the litigation arose out of a fraud practised on an international scale. When deciding how to respond to a letter of request, the court should bear in mind the need to protect intended witnesses from an oppressive request. However, no objection can be made to the request on the basis that it is a 'fishing' exercise if there is sufficient ground for believing that the intended witness might have relevant evidence to give on topics relevant to the issues in the action. On the particular facts, the questions were intended to elicit evidence for use at trial and the topics described were ones in respect of which the intended witnesses could reasonably be expected to have some relevant evidence to give. Nevertheless, the letters of request were oppressive, since allegations of complicity in the fraud had been made against the two intended witnesses and there was a possibility of their being joined as defendants in a civil action based on that alleged complicity. Accordingly, the Court of Appeal upheld the judge's dismissal of the claimant's application for an order giving effect to the letters of request.

The discretion is subject to limitations. Section 2(3) provides that an order shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the High Court making the order. Secondly, an

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appropriate to the particular trade would be regarded as 'unclean' if the goods are rendered less saleable as a result[5]. However, a bill is not necessarily unclean merely because it contains an unusual clause which purports, in certain circumstances, to exclude or limit the carrier's liability regarding the condition of the goods[6].

1 (1919) 1 Ll L Rep 69.
2 [1958] 1 QB 542 at 551.
3 *Westminster Bank Ltd v Banca Nazionale di Credito* (1928) 31 Ll L Rep 306 at 311 per Roche J.
4 In *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1979] 2 All ER 726,[1979] 2 Lloyd's Rep 450 there was a fire in the ship after loading; the bill of lading covering the sugar damaged by fire contained a notation to that effect. It was held that the notation did not affect the acknowledgment in the bill that the goods were shipped in apparent good order and condition, did not make the bill of lading unclean and that it was a good tender. Donaldson J's decision was affirmed by the Court of Appeal: [1980] 1 All ER 501, [1980] 1 WLR 495.
5 See Megaw LJs dictum to this effect in *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1980] 1 WLR at 519.
6 See *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542.

(ii) Carriage on deck

37.7 By UCP 600 art 26(a), a transport document must not indicate that goods are or will be loaded on deck. However, a transport document stating that the goods may be loaded on deck is acceptable.

(iii) 'Shipper's load and count'

37.8 By UCP 600 art 26(b), a transport document bearing a clause on its face such as 'shipper's load and count' or 'said by shipper to contain' is acceptable. Consequently, a disclaimer of responsibility in relation to the quantity of goods or the content of containers or packages does not render a transport document discrepant.

(iv) Freight charges

37.9 In the absence of express stipulation to the contrary in the credit, a bank will not concern itself with the payment or non-payment of freight. Accordingly, by UCP 600 art 26(c), a transport document may bear a reference, by stamp or otherwise, to charges additional to the freight, without such reference rendering it discrepant.

(b) Transport documents covering at least two different modes of transport (art 19)

37.10 Owing to their increasing prominence in international trade, the first transport documents addressed by UCP 600 are transport documents covering at least two different modes of transport. Such transport documents are known as 'combined' or 'multimodal' transport documents (the latter being the term used under UCP 500).

The requirements of UCP 600 art 19 largely reflect the position under UCP 600 art 20, relating to bills of lading, modified as necessary to reflect the fact that a multimodal transport document covers carriage before and after shipment from port to port.

A multimodal transport document implies that there will be 'transhipment' of the goods. Accordingly, even if the credit prohibits transhipment, banks must accept a multimodal transport document which indicates that transhipment will or may take place, provided that the entire carriage is covered by one and the same transport document (see art 19(b)-(c)).

In Position Paper No 4[1], the ICC's Commission on Banking Technique and Practice noted that many multimodal transport operators use a multi-format document titled, for example, 'Bill of Lading for Combined Transport Shipment or Port-to-Port Shipment' or 'Non-Negotiable Sea Waybill for Combined Transport Shipment or Port-to-Port Shipment'. A document so titled is acceptable under art 19 provided that the data content on the front of the document satisfies the requirement in the documentary credit for multimodal transport and for a negotiable document or for a non-negotiable document as the case may be. The Commission also stated that it is acceptable for a multimodal transport document to show the words 'carrier' and not the words 'multimodal transport operator'.

1 ICC Commission, 1 September 1994.

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(c) Bills of lading (art 20)

37.11 UCP 600 art 20 applies to all bills of lading, including negotiable and straight bills of lading, with the exception of charterparty bills of lading (which are the subject of separate provision in art 22).

By art 20(a), a bill of lading, however named, must satisfy the six requirements set out in art 23(a)(i)–(vi). These are that the document must appear to:

(i) indicate the name of the carrier and be signed by or on behalf of the carrier or the master;
(ii) indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit;
(iii) indicate shipment from the port of loading to the port of discharge stated in the credit;
(iv) be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading;
(v) contain terms and conditions of carriage, or make reference to another source containing such terms and conditions; and
(vi) contain no indication that it is subject to a charter party.

(i) Signature and authentication

37.12 Under art 20(a)(i), a bill of lading must appear on its face to indicate the name of the carrier and to have been signed by:

(a) the carrier identified as the carrier; or